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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

AMERICAN PUBLIC POWER ASSOCIATION, THE CITY OF JAMESTOWN, NEW YORK, HANCOCK-WOOD ELECTRIC COOPERATIVE, INC., OF NORTH BALTIMORE, OHIO, AND NORTHWESTERN RURAL COOPERATIVE ASSOCIATION, INC., OF CAMBRIDGE SPRINGS, PENNSYLVANIA,
Petitioners,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR POWER AUTHORITY OF THE STATE OF NEW YORK IN OPPOSITION

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OPINIONS BELOW

The Opinion of the Court of Appeals for the District of Columbia Circuit is in Appendix A to the Petition, and also in the record, pages 47-75. It is as yet unreported. The Opinion of the Federal Power Commission is in Appendix B to the Petition, and also in the record, pages 33-42.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. The license for the Niagara power project having been issued by the Federal Power Commission to respondent with preference provisions sought by petitioners, is there any invasion or threat of invasion of any legally protected right of petitioners so that they have a justiciable interest sufficient to prosecute their petition?

a. Does their "claim to the protection of the Senate reservation" afford them a justiciable interest?

b. Does the possibility of the application of the rule of *stare decisis* in some future cause of action involving other parties and some other Senate reservation to some other treaty concerned with other power project developments afford them a justiciable interest?

2. Should the judgment below be vacated if the controversy is not entirely moot, because the judgment has present effect?

3. Assuming the controversy is "probably moot", as asserted by petitioners, should the judgment below be vacated since, even if *res judicata*, the judgment would create no legal consequences adverse to petitioners and is consistent with the 1957 Act?

STATUTES, TREATY, AND FEDERAL POWER COMMISSION ORDERS INVOLVED

Section 4(e) of the Federal Power Act of 1920 is set forth in the Appendix to this Brief, pp. 1a-2a.

The 1950 Treaty between the United States and Canada, with respect to Niagara River water diversion, and the Senate reservation thereto, are set forth in the record, pages 25-33.

The Opinion and Order of the Federal Power Commission of November 30, 1956, dismissing respondent's application for a license to develop the Niagara power project, are set forth in Appendix B to the Petition, and also in the record, pages 33-42.

The Act of Congress of August 21, 1957 (Public Law 85-159) directing issuance of the license, is set forth in Appendix D to the Petition.

The Order of the Federal Power Commission of September 19, 1957, issuing the license, is set forth in the Appendix to this Brief, pp. 8a-19a.

STATEMENT

The petition for certiorari seeks relief in the alternative: First, a review of the decision below on the merits; or, second, if the "judgment" below is moot, a vacatur of that judgment. (Pet. p. 23). Power Authority of the State of New York, while strongly of the view that the decision below is correct, recognizes that it deals with an important question of Constitutional law which has not been settled by this Court. The Power Authority, however, opposes the granting of the petition for certiorari for the reasons that (1) the petitioners do not have sufficient justiciable interest to raise that question before this Court (2) the controversy is not entirely moot in the sense that the judgment below has present effect, and (3) even if "probably moot", as asserted by petitioners, the judgment, which is entirely consistent with the 1957 Act, would create no legal consequences adverse to Petitioners.

Petitioners were interveners before the Court of Appeals.* Neither the Federal Power Commission,

* There is a question whether petitioners, Hancock-Wood Electric Cooperative, Inc., and Northwestern Rural Electric

the respondent below, nor other interveners, Oneida Madison Electric Cooperative, Inc., and 25 other rural electric distribution cooperatives, nor Rochester Gas and Electric Corporation, have petitioned for certiorari. Intervener, The People of the State of New York, opposes the granting of the petition.

The Federal Power Act (41 Stat. 1063, as am.; 16 U.S.C. §§791-825r) in §4(e) thereof, authorizes the Federal Power Commission (referred to herein as the "Commission") to issue licenses for development, transmission, and utilization of power from streams over which Congress has jurisdiction under the Commerce Clause. The Niagara River, an international boundary river, is such a stream.

The 1950 Treaty with Canada made available to the United States additional water from the Niagara River to be diverted for power purposes. The Senate advised and consented to ratification of the treaty with a reservation:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit of

---

Cooperative Association, Inc., are properly parties in the proceeding before this Court. They are two of the twenty-eight members of the National Rural Electric Cooperative Association. The motion of that Association to intervene was denied by the Court of Appeals but the motion of the twenty-eight members to intervene was granted with the limitation "that the twenty-eight member cooperatives be and they are hereby, allowed to intervene *collectively as a single party in the above case*" (emphasis supplied).

Of the twenty-eight members only two of them, Hancock-Wood and Northwestern, are petitioners here. They have not sought to intervene before this Court but presumably rely on their limited intervention below where they were not parties but were only "collectively" with the other twenty-six members "a single party".

> the United States' share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

Canada "accepted" the reservation without procuring the approval of Parliament—

> "because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's rights or obligations under the Treaty:" (R 20-21).

Legislation, as contemplated by the reservation, was not passed until August 21 of this year, seven years later and after the decision of the Court of Appeals was handed down. That legislation is outlined below.

Meantime, on August 20, 1956, respondent, Power Authority of the State of New York, filed with the Commission an application under §4(e) of the Federal Power Act for a license for a power project for development of the Niagara River (R 9-24). Power Authority of the State of New York (referred to herein as the "Power Authority") is a corporate municipal instrumentality and political subdivision of the State of New York and has the duty, under the laws of that State, of developing hydroelectric power resources of the State of New York in the Niagara and St. Lawrence rivers. The Power Authority finances projects for developing these resources solely through moneys obtained from the sale of its revenue bonds to investors without State or Federal credit.

In support of its application the Power Authority urged before the Commission that the reservation re-

lated solely to a matter of domestic concern and did not affect the rights and obligations of the parties to the Treaty; that it was a mere colorable use of the treaty-making power and not a true reservation within the legal meaning of that term; and, therefore, it was not a part of the Treaty or of the "Supreme Law of the Land". Consequently, the reservation was not a bar to the exercise by the Commission of its jurisdiction under the Federal Power Act.

The Commission, on November 30, 1956, issued its opinion, findings, and order. (R 33-34; Pet. p. 30a). The Commission stated—

> "In the absence of the treaty reservation we would act on the Power Authority's application in accordance with the provisions of the Federal Power Act. But if we are to accept the injunction of the reservation as it stands, we would have no authority to consider the application of the Power Authority on its merits . . .
>
> "Since the reservation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as "the supreme Law of the Land" under Article VI of the Constitution. Thus assuming the validity of the reservation, before we may consider the Power Authority's application on its merits, it would seem the Congress must take action in accordance with the reservation to permit redevelopment under the Federal Power Act of the waters of the Niagara River made available by the 1950 Treaty."

The Commission further found that it was "without authority to issue a license" for the project and dismissed the application (R 38-39; Pet. p. 36a). Re-

hearing was denied January 2, 1957 (R 46; Pet. p. 40a).

The Power Authority, on January 4, 1957, petitioned the United States Court of Appeals for the District of Columbia Circuit, under §313(b) of the Federal Power Act, to set aside the Commission's order of dismissal (R 1). The present petitioners intervened before that Court. Petitioners stated to the Court that while they "desire immediate development of the additional power potentially made available to the United States by the 1950 Treaty with Canada", they also desire "that the development be authorized by legislation which will follow the historic congressional pattern of providing preferences to local public agencies in the marketing of the power produced by a public development". (Petitioner's Brief below, p. 3; App. this Brief, p. 20a). Consequently, petitioners challenged the Commission's jurisdiction, in the face of the Senate reservation, to grant the application of the Power Authority for a license.

The Court of Appeals entered judgment June 20, 1957, setting aside the order of dismissal and remanding to the Commission for further proceedings not inconsistent with the court's opinion (R 76). The Court of Appeals held that the Senate reservation was not a true reservation that becomes part of a treaty. It made no change in the rights or obligations of either party under the treaty, but was merely an expression of domestic policy which the Senate attached to its consent. (R pp. 52-53; Pet. pp. 6a-7a). The Senate reservation, therefore, was not "Law of the Land" under the Supremacy Clause in Article VI of the Constitution and did not alter the Federal

Power Act or the jurisdiction of the Commission thereunder.

By Public Law 85-159, approved August 21, 1957, the Commission was "expressly authorized and directed to issue a license to the Power Authority for the construction and operation of a power project with capacity to utilize all of the United States' share of the water of the Niagara River permitted to be used by international agreement". (Pet. p. 41a). This 1957 Act further directed the Commission to include, among the licensing conditions, certain preferences and other conditions "in addition to those deemed necessary and required under the terms of the Federal Power Act". Preference conditions of the type sought by petitioners were required by the 1957 Act to apply to half the power from the project. These preference conditions are presently satisfactory to petitioners. (Pet., pp. 10-11).

The Power Authority, on August 28, 1957, amended its original application so as to bring the application under the new Act as well as under §4(e) of the 1920 Act. The Power Authority stated (App. this Brief, p. 5a) in its amendment (referring to the preference conditions in §1(b) (1) and (2) of the 1957 Act) that—

> "The Attorney General of the State of New York has officially informed Applicant that these conditions are consistent with the provisions of the Power Authority Act [of New York State], and Applicant will accept them."

On August 29, 1957, the Commission announced that it would issue a license to the Power Authority as soon

as the necessary engineering and other studies could be completed, but that it would hold hearings later on the water conveyance facilities and the size of the reservoir.

On September 12, 1957, the Commission scheduled a public hearing to be held commencing October 1, 1957, respecting the issues raised by certain interveners before the Commission, the City of Niagara Falls, the Town of Lewiston, and the County of Niagara, New York, concerning their opposition to the type of water conduits and the size of the reservoir proposed by applicant, and respecting the issues raised by intervener, the International Paper Company, concerning its claim to water rights involved in *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239. (App. this Brief, p. 9a). That hearing is now in progress. Petitioners are taking no part in it.

Petitioners filed their petition for certiorari September 18, 1957, the last day they could legally do so.

On September 19, 1957, the Commission granted the amended application and issued the license to the Power Authority under the terms of the 1920 and 1957 Acts. (App. this Brief, p. 8a). As stated above, the license contains the preference provisions provided by Congress. (App. this Brief, Arts. 20-21, pp. 14a-15a). The license provides that certain further conditions will be later prescribed by the Commission, including details of the water conduits and size of the reservoir. These matters left open by the license are being dealt with in the hearing scheduled by the Commission for October 1st and now in progress.

On October 15, 1957, the Power Authority notified the Commission of its acceptance of the license.

ARGUMENT

I. Petitioners Have No Justiciable Interest

The question of standing to sue or justiciable interest depends on particular facts. This Court has characterized the question as a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations". *United States* v. *Federal Power Commission*, 345 U.S. 153, 156 (1953).

Before the petition for certiorari may be granted and the question of vacating the judgment below reached, petitioners must show that they have an interest sufficient to give them standing to petition this Court. Petitioners must show that the controversy is one that, as to them, involves actual or threatened invasion of—

> "some legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege". *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137 (1939).
>
> "The touchstone to justiciability is injury to some legally protected right . . ." *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 141 (1951).

Petitioners and others were accorded a right of intervention in this proceeding before the Commission, "provided, further, that the admission of the petitioners shall not be construed as recognition by the Commission that they, or any of them, might be aggrieved because of any order or orders by the Commission in this proceeding". Petitioners were not

"aggrieved" (see Act §313, 49 Stat. 860, 16 U.S.C. §8251(b)) by the Commission's order of dismissal.

In the Court of Appeals petitioners sought anew and were accorded the right to intervene before that Court in the review proceeding instituted by the Power Authority. This does not mean, however, that by the mere fact of intervention below, petitioners acquired sufficient interest to institute a review proceeding in this Court.

The record before this Court contains no statement of petitioners' interest, nor was any finding made below as to petitioners' interest. The petition for certiorari does not state petitioners' interest. In their brief before the Court below, petitioners did, however, make a statement of interest. (App. this Brief, p. 20a). They said that they "desire immediate development of the additional power potentially made available by the 1950 Treaty with Canada" but—

> "They desire, however, that the development be authorized by legislation which will follow the historic congressional pattern of providing preferences to local public agencies in the marketing of power produced by a public development".

That legislation was enacted. Petitioners now state that they do not object to the issuance of a license by the Commission to the Power Authority if it contains preference provisions (such as those in the 1957 Act) for the sale of project power to electric public utilities within the service area.* (Pet. pp. 10-11). Such a license was issued the day following the filing of the petition for certiorari.

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* Petitioners add "and if the Power Authority can lawfully accept them," i.e., accept the preference conditions. Pet. p. 11. Petitioners admit that the question of the Power Author-

The controversy below concerned the validity of the order of the Commission dismissing, for lack of authority to issue, the application of the Power Authority for a license under §4(e) of the Federal Power Act of 1920. Whatever interest, if any, petitioners, as interveners below, may have had with respect to the controversy, they no longer have any interest in it. They have not stated on this record any present interest sufficient to prosecute their petition for certiorari in this Court.

Moreover, petitioners not only have no present justiciable interest, but also, as pointed out below, they have never had a justiciable interest in the particular controversy decided below.

A. Petitioners Have No Legal Right in This Controversy to "Protection of the Senate Reservation."

While the petition for certiorari does not state petitioners' present interest, it does assert a claim to "protection of the Senate reservation". Petitioners say (Pet. p. 20)—

> "It is not right that these petitioners be left in the position of having their claims to the protection

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ity's legal capacity to accept the preference conditions is not before this Court. Pet. p. 11. Furthermore, the Attorney General of the State of New York, in his opinion of July 5, 1957, states that the Power Authority may legally accept preference conditions of the character that are found in the Act of August 21, 1957, and the Power Authority in its amended application stated that it would accept them. (App. this Brief, p. 5a). On October 15, 1957, the Power Authority in fact accepted the license including such preference conditions. The opinion of July 5 appears in the Appendix to the Brief of the People of The State of New York.

of the Senate reservation adjudicated adversely to them, and then be precluded from obtaining review of that judgment solely in consequence of enactment of the very statute designed to occupy the field reserved by the Senate reservation, but which may or may not accomplish that purpose, depending upon future events."

Valid or invalid, the Senate reservation, in contemplating Congressional legislation, vested in no one any legally enforceable right to such legislation. The courts are not a forum to seek or compel the enactment of legislation by Congress. Petitioners had no "right" to the enactment of legislation with or without preference provisions. Petitioners' right in this area was limited to their right to petition Congress under the First Amendment.

Neither did the Senate reservation give petitioners a legal right before the courts to bar the Commission from issuing a license pending further legislation. The provision in the reservation that "no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress," (even if the reservation were valid as law) imposed a duty on the Commission only, not on potential consumers of any power produced from the project. The reservation sets forth relations between two branches of Government. The Senate did not, by its reservation, commission potential consumers to defend whatever prerogatives the Senate may have had in the situation. When prerogatives of the Congress or either House are threatened, the Congress or either House may, if it chooses, seek relief from the courts in appropriate situations, but the Sen-

ate reservation created in petitioners no legally protected rights. Petitioners are not *parens Senatus*. Cf., *Frothingham* v. *Mellon*, 262 U.S. 447, 486 (1923); *Fairchild* v. *Hughes*, 258 U.S. 126 (1922).

Moreover, even assuming *arguendo* that the Senate reservation gave petitioners a legally protected right to bar the Commission from issuing a license pending further legislation, that right disappeared with the Act of August 21, 1957. Whatever legally protected rights petitioners may have, there is no present actual or threatened invasion of them.*

B. Petitioners Have No Legal Right in This Controversy With Respect to Reservations in Some Other Treaty

Petitioners have no present interest whatever in the Senate reservation to the 1950 Treaty with Canada, yet they invoke this Court's aid. Petitioners' reasons are not stated in their petition. Petitioners have, however, in a letter to counsel for the Power Authority, stated that—

> ". . . our principal reason for wishing to see the decision of the Court of Appeals vacated is the doubt cast by the language of the opinion on the *validity of treaty reservations not necessarily restricted to the 1950 Treaty with Canada.* We have deemed it necessary, therefore, to petition for a

* We fail to understand petitioners' assertion (Pet., p. 20) that the 1957 Act "may or may not . . . depending upon future events" accomplish the purpose of occupying "the field reserved by the Senate reservation." The validity of the 1957 Act is not questioned. The power of Congress to amend or repeal that Act is not questioned. Vacating the judgment below will not protect petitioners in any rights they may have in the 1957 Act.

writ of certiorari for the express purpose of requesting the Supreme Court to declare the judgment of the Court of Appeals moot, and to *vacate the opinion*. (emphasis supplied) (App. this Brief, p. 7a).

It is suggested that petitioners' present interest is in the Senate reservations to the Mexican Waters Treaty. See, Pet. p. 15, fn. Petitioners' concern appears to be with some possible future litigation involving other parties, a different treaty, different reservations, and different power projects. They hope that vacating the judgment below in this case will in some way place the imprimatur of this Court on the validity of Senate reservations to some other treaty, or at least devalue the opinion of the Court of Appeals as to the lack of validity as law of the Senate reservation to the 1950 Treaty with Canada. Even assuming that the rule of *stare decisis* would have some application in this speculative future litigation, that rule does not create a justiciable interest in petitioners in this case.

The petition for certiorari should be denied at the threshold on the ground that Petitioners have no justiciable interest.

II. The Judgment Below Should Not Be Vacated

When a controversy has become moot on its way to this Court, the practice of this Court has been to reverse or vacate with a direction to dismiss. This practice is limited, however, by the objective of preventing the judgment "from spawning any legal consequences." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

The judgment below should not be vacated even if petitioners were found to have sufficient justiciable interest to petition for certiorari. The judgment should not be vacated because it is not entirely moot even if it becomes *res judicata*, no legal consequences adverse to petitioners can be spawned. Further the judgment should not be vacated since it is consistent with the 1957 Act.

A. The Controversy Is Not Entirely Moot Because the Judgment, Which Is Completely Consistent With the 1957 Act, Is Presently Effective

Even petitioners recognize that the controversy is not entirely moot. They state only that:

> "The question whether the treaty reservation could or could not validly preclude proceedings under the Federal Power Act is thus rendered probably moot. *We say 'probably' because the 1957 Act is not plainly exclusive.*" (Pet. p. 20, emphasis supplied).

Petitioners elsewhere in their petition also state that:

> "the *judgment* . . . has *probably, although not certainly,* been rendered moot by the 1957 legislation, enacted after its entry, . . ." (Pet. p. 11, emphasis supplied).

The application of the Power Authority for a license was filed under § 4(e) of the Federal Power Act of 1920. The 1957 Act provides that a license shall be issued by the Commission to the Power Authority and shall include the licensing conditions in the 1957 Act "in addition to those deemed necessary and required under the terms of the Federal Power Act." (Pet. p. 41a). Thus the license is required to be issued under authority of both Acts. In consequence, the original

application was amended to bring it under the 1957 Act, as well as the 1920 Act. This procedure was not only in accordance with the Act of Congress, but also it avoided the delay that would have followed the filing of a new application and the investigations, reports, and administrative proceedings incident thereto. Pursuant to the original application as amended, the license was issued by the Commission under authority of both Acts. (App. this Brief, p. 13a).

The Commission's order dismissed the original application after a finding of lack of authority to issue it under §4(e) of the 1920 Act. The Court of Appeals' judgment is that the order of the Federal Power Commission on review is "set aside and the case remanded to the said Federal Power Commission for further proceedings not inconsistent with the opinion of this Court". Such "further proceedings" have now been had. Pursuant to the original application as amended, the license has now been issued by the Commission under §4(e) of the 1920 Act and Congress directed that it be issued under that Act provided the 1957 Act conditions were also attached to the license. To vacate a judgment setting aside the Commission's order dismissing the application for the license under §4(e), could be construed to leave the Commission's order of dismissal of the application in force with the sanction of this Court. There would thus be sanctioned a dismissal order that is contrary to the Commission's present order granting the application and issuing the license.

It accordingly appears that the judgment below setting aside the Federal Power Commission's order of dismissal and remanding the matter to the Commission is not without present effect and is not therefore

entirely moot. The concept of absolute finality is the only basis for the granting of motions to dismiss where questions have become moot.

In *Miller* v. *Milford*, 276 N.W. (Iowa, 1937) 826, 114 ALR 1423, 1437 it was said that

> "A question is not moot if there remains anything on which a decision of the Court can operate."

Petitioners are correct in stating that "the 1957 Act is not plainly exclusive . . .". The 1957 Act is only supplementary to the 1920 Act and the application must be applied for and issued under the 1920 Act, as well as the 1957 Act. This is required by the 1957 Act, itself, and is the procedure followed by the Power Authority in amending its original application.

There is also the very serious element of time involved and delay that could result from setting aside the judgment below, which further demonstrates it is not entirely moot. Unless the Court gives definite indication to the contrary, it could be argued by persons interested in obstructing the project that reinstatement of the Commission's order of dismissal might require the filing of a new application. A new application would result in new departmental investigations and reports and new proceedings before the Commission. Any such delay would be contrary to the public interest and is something that petitioners disclaim wanting to occur. The House Committee on Public Works stated in its report on the 1957 Act—

> "Emergency Need for Prompt Legislation
>
> "On June 7, 1956, a rockslide completely destroyed about two-thirds of the power generating capacity on the United States side of the

Niagara River. When this disaster occurred to the Schoellkopf powerplant of Niagara Mohawk Power Corp., the plant had a capacity of some 365,000 kilowatts of firm hydroelectric power. The operations of huge concentrations of electrometallurgical and electrochemical industries at Niagara Falls depend in substantial part upon this capacity. These operations constitute the principal sources of employment on the Niagara frontier and comprise the heart of the economy of the area. They are vital to the national defense. Substitute power, largely imported from Canada on a temporary basis, is much more costly.

"Further, Canada proceeded immediately to construct and complete the project redeveloping its share of the water, and, under the terms of the treaty, Canada has been and will continue to be, free to utilize our share of the water until we are ready to do so. The economic waste attributable to continued nondevelopment of the United States share of the water already aggregates hundreds of millions of dollars." (H. Rept. 862, 85th Cong., 1st sess., p. 2).

A similar statement was made by the Senate Committee on Public Works, S. Rept. 539, 85th Cong., 1st sess., p. 3. It is submitted that the public emergency involved is one of which this Court can and should take judicial notice.

B. The Judgment of the Court of Appeals Will Spawn No Legal Consequences Adverse to Petitioners

Even if the judgment of the Court of Appeals becomes *res judicata*, petitioners are not affected by it in this case save that it buttresses the license that petitioners favor and that has been issued. Neither can the judgment have any effect on petitioners by way of collateral estoppel.

The 1957 Act directed that the license to the Power Authority provide for utilizing *all* of the "United States share of the water of the Niagara River permitted to be used by international agreement." The license issued provides for development of all additional power available to the United States under the 1950 Treaty. There can be no other license for development of such power by the Power Authority or any other person. No question as to the validity of the Senate reservation to that Treaty and its effect as a bar to the Commission's jurisdiction can again arise.

The judgment of the Court of Appeals on the jurisdictional question arising out of the Senate reservation to the 1950 Treaty with Canada, even though that judgment becomes *res judicata*, will not give rise to collateral estoppel in some other litigation. Any other asserted cause of action involving that question would be wholly frivolous. Petitioners suggest no possible adverse effects from *res judicata*. Moreover, where a final decision on appeal to the highest Court cannot be obtained because the controversy is moot, the judgment is not conclusive in a subsequent action on a different cause of action. Restatement on Judgments, § 69(2); *Allegheny County* v. *Maryland Casualty Co.*, 146 F 2d 633 (CA 3, 1944), certiorari denied, 325 U.S. 855 (1945). What petitioners actually desire is to expunge the *opinion* of the Court of Appeals. (App. this Brief, p. 7a). Vacating the judgment will not do that.

No injustice would be worked by denying the petition for certiorari without a vacatur. The Federal Power Commission has, in this case, exercised jurisdiction which is unassailable as the matter now stands. In the exercise of that jurisdiction, the Com-

mission has done that which the petitioners seek with respect to preference provisions. All the water available for development is now licensed for development subject to preference rights in complete harmony with the law and petitioners' claims. There is no possibility of spawning legal consequences in the future which are adverse to petitioners. In fact, what they now have is made unassailable by leaving undisturbed the judgment below and denying the petition.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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